STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELLEN TOOKEY and BELOIT EDUCATION ASSOCIATION, Complainants, vs. CITY OF BELOIT SCHOOL DISTRICT BOARD OF EDUCATION AND DR. EUGENE TORNOW AND GENEVA JOHNSON, Respondents.	:	Case XII No. 20549 MP-628 Decision No. 14702-B

Appearances:
Mr. Evan E. Hughes, Executive Director, Rock Valley United Teachers Uniserv, appearing on behalf of the Complainants.
Hansen, Eggers, Berres & Kelley, S.C., Attorneys at Law, by Mr. George Blakely, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainants having on June 4, 1976 filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondents had committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act; and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(5) of the Wisconsin Statutes; and a hearing on said complaint having been held in Beloit, Wisconsin on August 26, 1976 before the Examiner; and the Examiner having considered the evidence and arguments of Counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Beloit Education Association, herein Complainant Association, is a labor organization functioning as the collective bargaining representative of "all elementary and secondary teachers, including substitute teachers" employed by the City of Beloit School District Board of Education; and that Ellen Tookey, herein Complainant Tookey, was a member of the collective bargaining unit represented by Complainant Association during the 1975-1976 school year.

2. That the City of Beloit School District is a municipal employer; that the City of Beloit School District Board of Education, herein Respondent Board, functions as the agent of the City of Beloit School District; that Dr. Eugene Tornow, herein Respondent Tornow, is the Superintendent of Schools of the City of Beloit School District and functions as its agent; and that Ms. Geneva Johnson, herein Respondent Johnson, is employed as an Administrative Assistant by the City of Beloit School District and functions as its agent.

3. That the parties' 1975-1976 collective bargaining agreement provides for the final and binding arbitration of any unresolved "complaint, controversy or dispute based upon an event or condition which involves the interpretation, meaning or application of any provisions of this agreement;" and that Article IV(A) of said bargaining agreement states that:

"Substitute teachers shall be paid the sum of $28 per day. Substitute teachers who teach 10 consecutive working days shall be placed on the regular salary schedule for payment thereafter."

4. That just before the beginning of the 1975-1976 school year, a regular full-time teacher within the school system's music department resigned; that Respondents decided to fill the position on a long term substitute basis inasmuch as they were in the process of re-evaulating the staff needs of the music department in light of a general decline in enrollment; that on September 12, 1975, after classes had begun, Respondent Johnson and William Decker, a supervisory employe, interviewed Complainant Tookey for the position; that Complainant Tookey was told that the position was being filled on a long term substitute basis for the 1975-1976 school year because of a re-evaluation of staffing needs and because classes had already begun; and that she was further informed that the position involved the fulfillment of all the responsibilities of the departed regular teacher.

5. That shortly after the September 12 interview, Respondent Tornow, in conjunction with Respondent Johnson and Decker, decided to offer the position to Complainant Tookey; that, pursuant to a long standing practice regarding the compensation of long-term substitutes, Respondent Tornow decided to extend certain benefits to Complainant Tookey which he believed were not contractually required; that on September 15, 1975 Complainant Tookey accepted the position as long term substitute for the 1975-1976 school year; and that on September 16, 1975 she began teaching.

6. That on September 19, 1975 the parties reached a tentative agreement on their 1975-1976 collective bargaining agreement, and that said agreement was ratified by the members of Complainant Association on September 22, 1975 and by Respondent Board on October 7, 1975.

7. That on September 23 Complainant Tookey received the following statement from Respondent Tornow:

"This is to notify you that you have been hired as a Long Term Supply Substitute. As A Long Term Supply Substitute, the Board of Education has no obligation under the continuing contract statutes.

Your salary will be based on the teacher's salary schedule reflecting your preparation and experience. Bi-weekly paydays will be computed by multiplying 1/192 of your salary times the number of contract days remaining in the year, divided by the number of bi-weekly paydays remaining in the school year.

You will be eligible for the following benefits: one day per month sick leave, State Teacher's Retirement Benefits paid by the school district, and group health benefits.

Please sign both copies and return the carbon copy to the Office of the Superintendent of Schools. This will indicate your acceptance of this offer.

Thank you."

8. That Complainant Tookey discussed the letter with an active member of Complainant Association who advised her not to sign the contract because it was "illegal"; that on September 24 Complainant Tookey discussed the contract with Respondent Johnson and indicated uncertainty as to why she had not been issued a regular teaching contract and was not covered by Sec. 118.22, Stats.; that Respondent Johnson responded by stating that Complainant Tookey's options were to either sign the contract or leave the position; that Complainant Tookey signed the contract; that Respondent Johnson expressed an interest in who had been raising questions about the legality of the contract and that Complainant Tookey stated that a member of Complainant Association had raised such questions.

9. That shortly thereafter Complainant Tookey became a member of Complainant Association; and that Respondents were unaware of said membership or any other activity by Complainant Tookey on behalf of Complainant Association.

10. That Complainant Tookey taught within the school system's orchestra program until the end of the 1975-1976 school year; that on March 15, 1976 she did not receive a teaching contract for the 1976-1977 school year nor did she receive a non-renewal notice; that on March 23 Complainant Tookey sent the following statement to Respondents:

> "Please Note:
>
> At this time I plan to teach in the Beloit Public School System during the 1976-1977 contract year. As of March 15, 1976, I did not receive a non-renewal notice from the Beloit Public School System or the Beloit Board of Education.
>
> I have been teaching full-time at Roosevelt Junior High, Memorial High, Morgan, McLenegan, Merrill, Waterman, Todd, Robinson, and Wright schools. I have been the string instructor since September 16, 1975, fullfilling all duties as required under contract.
>
> I have not been offered a contract for the 1976-1977 school year. Therefore, I am assuming continuous employment in the Beloit School District as stipulated under Wisconsin State Statutes."

and that in May 1976 Complainant Tookey filed a grievance alleging that Respondents had committed certain contractual violations.

11. That the music department was reorganized during the summer of 1976 in a manner which eliminated the position held by Complainant Tookey during the 1975-1976 school year; that said reorganization did create a part-time position within the school system's orchestra program; that Complainant Tookey was one of approximately one hundred applicants for said position; that Complainant Tookey was not offered said position and was not employed by Respondent Board in any position at the time of the instant hearing.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Respondents, by failing to re-employ Complainant Tookey for the 1976-1977 school year, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act.

2. That Respondents, as a result of Respondent Johnson's September 24, 1975 conversation with Complainant Tookey, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

3. That Respondents, by offering Complainant Tookey a contract which failed to state that its content was subject to amendment by a subsequent collective bargaining agreement, committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

4. That inasmuch as the parties' 1975-1976 collective bargaining agreement contained provision for final and binding arbitration of disputes over alleged violations of said agreement, the Commission will not assert its jurisdiction to consider the merits of Complainant's allegation that Respondents violated the 1975-1976 bargaining agreement

and thus committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Respondent City of Beloit School District Board of Education, Dr. Eugene Tornow, and Geneva Johnson shall immediately:

> Cease and desist from issuing contracts to individuals in the collective bargaining unit represented by the Beloit Education Association while collective bargaining is in progress unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement.

IT IS FURTHER ORDERED that all remaining portions of the instant complaint be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 31st day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainants allege that Respondents violated Section 111.70(3)(a)1 and 3 of MERA by warning Complainant Tookey that membership in Complainant Association could adversely affect her status and by subsequently failing to employ her for the 1976-1977 school year. Complainants further allege that Respondents committed prohibited practices within the meaning of Section 111.70(3)(a)4 by issuing a contract to Complainant Tookey which failed to state that it was subject to amendment by a subsequently reached collective bargaining agreement. Finally Complainants assert that the terms of the contract offered Complainant Tookey violated the parties' 1975-1976 bargaining agreement and thus that Respondents violated Section 111.70(3)(a)5 of MERA. Respondents deny all said allegations.

Alleged Violation of Sec. 111.70(3)(a)5

Section 111.70(3)(a)5 of MERA makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement to which it is a party. However the Commission has consistently refused to assert its jurisdiction to consider alleged contractual violations when the parties' bargaining agreement provides for the final and binding impartial disposition of such issues.

The record herein reveals that the bargaining agreement does provide for the final and binding arbitration of unresolved disputes over the content and proper interpretation of said agreement. Furthermore the record contains no basis for concluding that the parties have waived resort to said process or that the Respondent has ignored or frustrated same. Indeed there is evidence that Complainant Tookey has in fact filed a grievance alleging certain contractual violations and that said grievance is being processed. Therefore, with respect to contractual violations alleged in the instant proceeding, the Commission will not assert its jurisdiction to reach the merits of said allegation.

Alleged Violations of Section 111.70(3)(a)4

Complainants allege that the Respondents violated that portion of Section 111.70(3)(a)4 of MERA which makes it a prohibited practice for a municipal employer:

> ". . . to issue or seek to obtain contracts, including those provided for by statutes, with individuals in the collective bargaining unit while collective bargaining mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contained express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement."

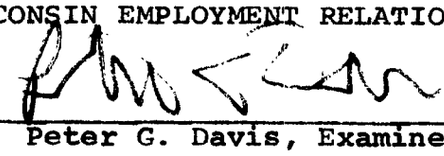
Respondents do not deny failing to place such a disclaimer on the contract offered to Complainant Tookey but assert that collective bargaining was not "in progress" at the time the contract was offered and thus that such a proviso was not required. This assertion is based upon the fact that the parties reached a tentative agreement on their 1975-1976 contract on September 19, 1975 and that the contract was not offered to Complainant Tookey until September 23, 1975.

The Examiner must reject the Respondents' assertion. Collective bargaining is "in progress" within the meaning of Sec. 111.70(3)(a)4

Turning to the first element of Complainants' burden of proof, the Examiner finds no substantial basis in the record for a conclusion that any of Respondents were aware of Complainant Tookey's union membership or any other protected concerted activity which occurred after she accepted her long-term substitute contract. Indeed Complainants failed to indicate how Respondents would even have had access to said information. Absent evidence of Respondents' knowledge of Complainant Tookey's concerted activity, the Examiner must reject Complainant's assertion with respect to the discriminatory failure to re-employ.

Dated at Madison, Wisconsin this 31st day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner